NO. 22669

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA, ex rel., ROBERT K. CORBIN, Maricopa County Attorney,	)
Petitioners and Appellants,	)
vs.	)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA and WALTER E. CRAIG, a Judge thereof,	)
Respondents and Appellees.	)

BRIEF OF PETITIONERS AND APPELLANTS

DARRELL F. SMITH
The Attorney General of the State of Arizona

NORVAL C. JESPERSON
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007

MARK WILMER
Special Assistant Attorney General
400 Security Building
Phoenix, Arizona 85004

TABLE OF CONTENTS

NOTE

Due to the press of time it was not possible to completely check ultimate disposition of all cases prior to completing Brief. However, the index of cases, it is believed, reflects this history with reasonable accuracy.

CITATIONS

Cases

Cases (continued)

Cases (continued)

Cases (continued)

STATUTES AND TREATISES

STATUTES AND TREATISES (continued)

NO. 22669

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF ARIZONA, ex rel., ROBERT K. CORBIN, Maricopa County Attorney,	)
Petitioners and Appellants,	)
vs.	)
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA and WALTER E. CRAIG, a Judge thereof,	)
Respondents and Appellees.	)

BRIEF OF PETITIONERS AND APPELLANTS

DARRELL F. SMITH
The Attorney General of the State of Arizona

NORVAL C. JESPERSON
Assistant Attorney General
159 Capitol Building
Phoenix, Arizona 85007

MARK WILMER
Special Assistant Attorney General
400 Security Building
Phoenix, Arizona 85004

STATEMENT OF THE JURISDICTIONAL PLEADINGS AND FACTS

Hooper and Scroggs Case

A complaint was filed in the United States District Court by Ron Kent Hooper and Purvis Ole Scroggs as plaintiffs against Honorable William H. Gooding, Judge of the Superior Court of Maricopa County, Arizona and the State of Arizona by Robert Corbin, County Attorney of Maricopa County, Arizona, seeking a temporary restraining order restraining Gooding and Corbin from proceeding with an open preliminary hearing pending hearing upon Plaintiffs' Motion for a Preliminary Injunction. The complaint also sought a permanent injunction against a further preliminary hearing until the defendant, Gooding, should exercise his discretion in the matter as to whether the hearing should be open or closed.

The complaint alleged that the

plaintiffs were each citizens of the United States and residents of Phoenix, Arizona. Hooper was alleged to be a duly licensed member of the State Bar of Arizona.

Gooding was sued in his official capacity as Judge of the Arizona Superior Court and Corbin in his official capacity as County Attorney of Maricopa County, Arizona.

It was alleged that criminal proceedings were pending against the plaintiffs in the Superior Court of Maricopa County and that Judge Gooding was sitting as as a committing magistrate to determine if probable cause existed to bind the plaintiffs over for trial in the Maricopa County Superior Court.

The plaintiffs alleged that evidence had been received by Judge Gooding as to the nature of the accusations against plaintiffs as part of preliminary hearing motions and that on the basis of this testimony the plaintiffs, as defendants in the state

criminal actions, were entitled to and moved the magistrate for an exclusionary order barring all persons from the hearing except court officers and witnesses, when testifying.

Judge Gooding, it was alleged, found that plaintiffs would be damaged as to their professional and business reputations and would be otherwise damaged but held that he had no power to close the hearing.

Plaintiffs alleged that the Arizona Supreme Court refused to entertain a Petition for a Writ of Mandamus directed to Judge Gooding and that the constitutional rights of the plaintiffs under the Sixth, Ninth and Fourteenth Amendments to the United States Constitution would be violated if the hearing was not closed. The plaintiffs then alleged that the refusal of Judge Gooding to exercise his discretion amounted to action under color of state law.

Jurisdiction in the District Court to

entertain and act upon plaintiffs' complaint was asserted to flow from Section 1343, Title 28 and Section 1983, Title 42, United States Code. District Judge Craig issued a temporary restraining order and after hearing, a preliminary injunction, to be more fully reviewed in connection with the Concise Statement of the Case.

The State of Arizona and Robert Corbin as County Attorney has appealed from the original order entered by Judge Craig, by Notice of Appeal filed in the District Clerk's office March 15, 1968, and from the Findings of Fact, Conclusions of Law and Order and Judgment, entered March 20, 1968, by Notice of Appeal filed March 20, 1968.

Jurisdiction in the Court of Appeals to entertain this appeal flows from the provisions of Section 1292, Title 28, United States Code.

Jurisdiction in the Court of Appeals to entertain the Petition for a Writ of Mandamus, or alternatively, a Writ of Prohibition, flows from the All Writs statute, Section 1651, Title 28, United States Code.

Borquez Case

The complaint in the Borquez case tracks the Hooper and Scroggs complaint in rather minute detail. A Justice of the Peace, Ida Westfall, is the judicial defendant and Borquez, the plaintiff, is alleged to be a juvenile released by the Juvenile Court to the Maricopa County authorities for prosecution as an adult for murder.

District Judge Craig issued a temporary order also tracking the Hooper and Scroggs preliminary order and set a hearing on issuance of an interlocutory order for March 13, 1968.

Prior to that date these proceedings

were instituted and there has therefore been no interlocutory order issued. In this respect the cases, procedurally, are in a different posture.

The jurisdiction asserted in the District Court is again Section 1343, Title 28, United States Code and Section 1983, Title 42, United States Code.

Jurisdiction in the Court of Appeals to entertain the Petition rests upon the All Writs statute, Section 1651, Title 28, United States Code.

CONCISE STATEMENT OF THE CASE

Two complaints were filed in the State Court of the State of Arizona by the County Attorney of Maricopa County, Arizona, in one case charging Ron Kent Hooper and Ole Purvis Scroggs as defendants with the crime of Receiving Stolen Property and in the other charging Danny Borquez with the crime of

murder.

The Hooper and Scroggs case was assigned to Judge William H. Gooding, a Superior Court judge, as a magistrate for preliminary hearing, to determine if there was probable cause to hold the defendants for trial in the Superior Court for the charged crimes. The Borquez case was assigned to Justice of the Peace, Ida Westfall, as a magistrate for a like purpose.

Prior to the taking of evidence in each case the defendants moved for an exclusionary order requiring that all persons, other than court officials, witnesses when testifying, counsel and the parties, be removed from and remain outside the courtroom. The basis for the motion in each case was alleged interference with the defendants' right to an impartial jury, if held to answer and, further, that the respective defendants' professional, business

and general character reputations would be irreparably damaged and their right of privacy illegally invaded.

Judge Gooding, on the basis of certain evidence theretofore received by him in hearings on motions, found that an exclusionary order should be entered but that he lacked jurisdiction to enter such an order.

It is alleged in the Borquez case that Justice of the Peace Westfall made like findings and also refused to enter an exclusionary order because of lack of jurisdiction so to do.

Prior these hearings Rule 27, Arizona Rules of Criminal Procedure, had read as follows:

> "During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all are examined.

> The magistrate shall also, upon the request of the defendant, exclude from the examination every person except attorneys in the case, and officers of the court."

On January 29, 1968, the Arizona Supreme Court amended Rule 27, effective February 1, 1968, by striking therefrom the last sentence thereof.

The evidence upon which Judge Gooding acted in concluding as he did and upon which Justice of the Peace Westfall concluded as she is alleged to have concluded was not before the District Judge and is not part of the record.

Hooper and Scroggs first filed suit in the United States District Court for the District of Arizona for injunctive relief restraining the Superior Court judge from proceeding with an open preliminary hearing until the judge exercised his discretion as to whether the hearing should be open or closed.

The order announced from the bench,

after hearing, by Judge Craig, ordered a preliminary injunction prohibiting an open preliminary hearing as to Hooper and Scroggs "until such time as the Arizona Supreme Court may have an opportunity to clarify the interpretation of Rule 27, as amended." The Court also instructed the County Attorney to institute "appropriate proceedings" in order for the Supreme Court of Arizona to clarify Rule 27, as amended.

The formal Findings of Fact, Conclusions of Law and Order and Judgment, signed and entered some ten days later, after this cause was filed in the Circuit Court, over the objections of the State of Arizona and the County Attorney, enlarged upon and embellished the order of March 8, 1968. The Order and Judgment is materially different from the Order announced from the bench.

The District Judge, in effect, exercised the asserted discretion of the Arizona

Superior Court judge, for the injunction ran against holding any further open preliminary hearing in the Hooper and Scroggs case pending clarification by the State Court of Rule 27.

The formal, written order requested that the County Attorney institute an appropriate proceeding to procure an Arizona Supreme Court ruling as to the discretion of magistrates to hold closed preliminary hearings. The injunction was made "effective pending clarification of the interpretation of Rule 27 of the Rules of Criminal Procedure for the State of Arizona, as amended by the Supreme Court of Arizona."

The Borquez case was pending for hearing when this proceeding was instituted, hence no formal or other findings were made by the District Court.

While the various factual findings made by the District Judge and the magistrate, Gooding, find little support in any evidence,

for the purposes of this appeal they may be assumed as true.

They are:

1. There had already been substantial pretrial publicity about each case.

2. The principal witness for the prosecution in the Hooper and Scroggs case had admitted to numerous convictions for sexual and drug offenses.

3. The principal witness for the prosecution in the Hooper and Scroggs case had admitted to bargains made with law enforcement officers to dismiss nearly thirty charges pending in Arizona against her and her husband.

4. The principal prosecution witness had made extremely derogatory remarks about Hooper's legal ability.

5. That evidence would be produced at the preliminary hearing which very well might not be admissible at the time of trial,

if there was a trial.

6. That one of the defendants in the cause before the Court was a professional man; that the other was a businessman; that any publicity in connection with the matters then before the Court would be detrimental to their professional and business reputations, and affect their livelihoods.

7. That the amendment to Rule 27 of the Arizona Rules of Criminal Procedure constituted a mandate from the Supreme Court of Arizona that a judge of the Superior Court of Arizona or a Justice of the Peace sitting as a magistrate could not in its discretion exclude all persons from a preliminary hearing. (Magistrate Gooding).

8. That if publicity were distributed generally with respect to the evidence submitted at the preliminary hearing in the State Court the defendants in the State Court proceeding might well suffer irreparable injury; that in the event of general publicity of the

matters presented at the preliminary hearing in the State Court proceeding there might well be a likelihood that a fair and impartial jury might not be obtainable in a trial in Maricopa County or adjacent counties.

9. Plaintiffs in this cause had exhausted their state remedies in the state courts.

The Borquez case is pending in the District Court upon the preliminary order issued by the District Judge upon the verified complaint of Borquez. The preliminary order found that the Justice of the Peace had inherent power to order a closed hearing for good cause, that substantial constitutional questions were presented and that Borquez had exhausted his state remedies. Accordingly the state magistrate was ordered to refrain from any further open preliminary hearings until March 13, 1968, at 11 o'clock a.m. or until further order of the Court, at which

time the parties were directed to appear "for argument of the matter presented in this cause."

The Attorney General of the State of Arizona thereupon prepared and presented the Petition of the State of Arizona and its County Attorney, Robert Corbin, for a Writ of Mandamus or Prohibition, as the Court might determine applicable to correct this misuse of judicial power by the District Court.

The Court of Appeals directed that the matter be considered and treated both as an appeal on the merits from an order granting an interlocutory injunction and as a Petition for an extraordinary writ.

Accordingly Petitioners filed a Notice of Appeal to the Court of Appeals on March 15, 1968, and following the entry of the Findings of Fact and Conclusions of Law and Order and Judgment, filed a further Notice of Appeal to the Circuit Court of Appeals March 20, 1968.

SPECIFICATIONS OF ERROR RELIED UPON

SPECIFICATION OF ERROR I

The District Judge erred in accepting jurisdiction and granting an injunction staying state court action contrary to the restrictions imposed upon such action by Section 2283, Title 28, United States Code, for the reason such injunction was not

(a) expressly authorized by Act of Congress;

(b) necessary in aid of the District Court's jurisdiction; or

(c) necessary to protect or effectuate its judgments.

SPECIFICATION OF ERROR II

The District Judge erred in granting an injunction and staying State court action for the reason there was no showing of clear and imminent irreparable injury sufficient to warrant federal interference with State court

action.

SPECIFICATION OF ERROR III

The District Judge erred in granting an injunction staying State court action for the reason the plaintiffs (defendants in the State court) had an adequate remedy for relief, if justified, and had not exhausted their state remedies, i.e., by Motions to Quash the Information addressed to the trial court and by appeal to the state appellate courts if necessary. Further, a Writ of Mandamus does not lie to control discretion of an inferior tribunal or to review error in interlocutory orders within the jurisdiction of the inferior tribunal.

SPECIFICATION OF ERROR NO. IV

The District Judge erred in granting an injunction staying State court action for the reason that the complaints affirmatively showed on their face that substantially the same relief had been sought by plaintiffs in both the Arizona Court of Appeals and the Arizona Supreme Court and had been refused

plaintiffs by the Arizona appellate courts. This constituted a State court interpretation of Arizona law that either the magistrate had no inherent power to close a hearing because of Article 2, Section 11 of the Arizona Constitution or that there was no sufficient showing of clear, imminent and irreparable injury to plaintiffs such as warranted denying the public the right and liberty of observing the court processes of the Arizona Courts as guaranteed by both the United States and the Arizona Constitutions. In either event, the error of the Arizona Courts, if in fact error was committed, is not subject to review by a United States District Court under its equity powers.

SPECIFICATION OF ERROR NO. V

The District Judge erred in assuming jurisdiction as to each complaint upon the authority of Section 1983, Title 42, United States Code, for the reasons

(a) said statute is inapplicable to the State of Arizona, a Superior Court or Justice of the Peace and a County Attorney;

(b) the ruling of a magistrate refusing to close a preliminary hearing to the public pursuant to such magistrate's interpretation of state statutes does not constitute action by a "person" under color of a statute, ordinance, regulation, custom or usage of a state;

(c) A Superior Court Judge, Justice of the Peace and County Attorney are not "liable" under Section 1983 to suit at the instance of a "party injured" when acting within their judicial or quasi-judicial authority and jurisdiction.

SPECIFICATION OF ERROR NO. VI

The District Judge erred in assuming

jurisdiction as to each complaint upon the authority of Section 1343, Title 28, United States Code, for the reason that the refusal of each magistrate to construe Rule 27, Arizona Rules of Criminal Procedure, as amended, and the Arizona constitutional provision, Article 2, Section 11, as allowing a magistrate inherent power to order a closed preliminary hearing does not constitute "deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" nor does it amount to ground for equitable relief under any Act of Congress providing for protection of civil rights.

SPECIFICATION OF ERROR NO. VII

The District Judge erred in finding (p. 1, lines 21-29, Findings of Fact, Conclusions of Law and Order) that "both counsel

(counsel for Ron Kent Hooper and Purvis Ole Scroggs and for State of Arizona and Robert Corbin, as County Attorney) concurred that if * * Honorable William H. Gooding * * had inherent power to exclude the public * * the cause referred to was an appropriate cause for the Court to exercise its discretion in favor of a closed hearing" for the reason that there is no evidence in the record to support such a finding.

SUMMARY OF ARGUMENT

I

Section 2283, Title 28, United States Code, provides:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Neither Section 1983, Title 42, United States Code nor Section 1343(3) and (4), Title

28, United States Code, is an Act of Congress expressly authorizing a Court of the United States to grant an injunction to stay proceedings in a State court.

II

Even if either Section 1983 or Section 1343 be construed to constitute such an express authorization there was no showing, either by verified complaint or by evidence of an exceptional case demonstrating clear, imminent and irreparable damage to any plaintiff in the District Court flowing from a violation of any federal constitutional rights of such plaintiff as warranted a Federal court in interfering with and embarrassing routine State court criminal proceedings.

III

Mere speculative possibility that

(a) evidence which very well might not be admissible at the time of trial would be produced at the preliminary hearing;

(b) if publicity is distributed generally with respect to evidence admitted on the preliminary hearing the defendants in the State court proceeding "might well suffer irreparable injury";

(c) in the event of general publicity of the matters presented at the preliminary hearing there "might well be a likelihood that a fair and impartial jury might not be obtainable in a trial in Maricopa County or adjacent counties"

falls far short of a showing of a clear and imminent danger of irreparable injury to a defendant through disregard of a claimed constitutional right of such defendant as is required to justify a Federal court in interfering in a routine criminal prosecution in a State court.

IV

The fact that a defendant is a lawyer, a businessman or a minor and evidence adduced at a preliminary hearing might be embarrassing or result in some damage to the reputation of such defendant does not give rise to a presumption that there is a clear and imminent danger of irreparable damage to such defendant such as warrants a Federal court interfering in a routine criminal prosecution in a State court and directing a State Judge or Justice of the Peace as to how such proceeding shall be conducted. This is particularly true when the only showing made discloses that the principal prosecution witness has a criminal record for sex and dope crimes and is unprincipled, since such a showing would only have the effect of destroying her trustworthiness as a witness and as tending to exonerate the defendant.

V

The effect of the claims of plaintiffs in the District Court, simply stated, were

(a) Rule 27, Rules of Criminal Procedure as amended and Article 2, Section 11, Arizona Constitution, do not restrain a magistrate in his discretion from ordering a closed preliminary hearing in the exercise of his inherent jurisdiction so to do, upon a proper showing of the need therefor;

(b) Judge Gooding and Justice of the Peace Westfall misinterpreted the Arizona law -- i.e., made a mistake as to the law in making an interlocutory ruling which prejudiced plaintiffs' constitutional rights;

(c) A federal district judge, in the exercise of the equity powers of a District Court may intervene

from time to time in a State court criminal prosecution and correct such errors as the State court criminal proceeding goes forward.

VI

If the foregoing does not properly analyze plaintiffs' position in the District Court below then it follows, in view of the stout and unequivocal assertions by plaintiffs of the clear violation of their federal constitutional rights by the magistrates in rulings denying a closed hearing, that Rule 27, as amended, and Article 2, Section 11 of the Arizona Constitution as interpreted by the State courts contravenes the United States Constitution and hence are unconstitutional.

If this is the position of the plaintiffs in the District Court then only a three-judge Federal District Court could make that determination and Judge Craig was without jurisdiction to rule in the matter.

VII

Contrary to the stated findings and conclusions in the District Court's Findings and Conclusions, plaintiffs in the District Court had not exhausted their State court remedies.

If, as plaintiffs contend, the magistrates in the State court had inherent power to order a closed preliminary hearing such power must be a discretionary power, to be exercised by the magistrate, if in his discretion irreparable harm may flow to a defendant if an open hearing is held and the public interest dictates that an order closing a preliminary hearing to the public be entered.

The allegation is made that plaintiffs had sought a Writ of Mandamus from the Arizona appellate courts directing the magistrates to order the preliminary hearing closed to the public and that the Arizona appellate courts had declined to entertain the petitions. Hence, it is concluded, plaintiffs had

exhausted their state remedies.

It is elementary law, at least in Arizona, that a Writ of Mandamus may not be employed to control the discretion of an inferior tribunal; neither may it be used in lieu of invoking the appellate procedures to correct an error in an interlocutory order made by an inferior tribunal.

Further, it is elementary law, at least in Arizona, that whether or not a writ issue is discretionary with the tribunal to which application is made. Clearly the Arizona appellate courts may well have concluded that the Petitioners in those courts had not made a showing which justified issuance of a prerogative writ and that the error of the magistrate, if in fact error, could be readily examined and corrected, if found to be prejudicial, by the orderly appeal process.

ARGUMENT - GENERAL

I. The position of appellees (for convenience, unless otherwise indicated, the term appellees will be used to apply generally to plaintiffs in the District Court cases and to both respondents and appellees) can best be described as ambivalent. On the one hand it is argued that the magistrates in the State court have inherent power to order a closed hearing -- a discretionary power so to do if a showing of prejudice is made -- yet hot on the heels of that argument comes the argument, somewhat disguised it is true, but nonetheless it appears to be their argument that the magistrate must close the hearing because of the constitutional rights of plaintiffs.

Appellees have a hard choice. If the argument is that under state law the magistrate has the inherent power to close the hearings but misinterpreted the state law then the

magistrate simply made a mistake, but a mistake as to law in a matter within his jurisdiction.

Do appellees contend that a Federal court may review and nullify under its equity powers interlocutory rulings of a State court in a state criminal prosecution, reviewable on appeal under an orderly state appeal procedure and by injunction nullify or correct any error claimed to involve federal constitutional rights of defendants and asserted to have been made by the State court in interpreting state law?

To state the question is to state the answer.

Appellees must then be driven to the contention that the magistrate must close the hearing to protect the constitutional rights of the plaintiffs below and hence Rule 27, Arizona Rules of Criminal Procedure, as amended, and Article 2, Section 11, of

the Arizona Constitution as construed by Judge Gooding, contravene the Constitution of the United States and hence are void.

What then about the requirements of Section 2281, Title 28, United States Code?

II. The substance of the findings bearing upon the claimed irreparable damage to defendants in the State court proceeding may be stated and disposed of as follows:

(a) There had already been substantial pretrial publicity. (Good or bad?)

Pretrial publicity, unless such as would inflame the community or make public prejudicial matter wholly inadmissible in evidence, has never been thought to be damaging to a defendant's rights to a fair trial. There was no showing of any such publicity which could possibly impair defendants' rights to a fair trial.

(b) Evidence would be produced at the preliminary hearing which very well might not

be admissible at the time of trial.

This is a most puzzling finding by the magistrates adopted by the District judge. Does it amount to a confession of judicial incompetency on the part of the magistrates involved -- a lack of legal knowledge sufficient to enable the presiding magistrate to exclude irrelevant, incompetent or improper evidence?

Does it indicate that defense counsel proposed to turn the preliminary hearing into a discovery device, subpoena all available possible witnesses, state or otherwise, and interrogate them fully as to everything which they might know about the matter even if in the process improper evidence be put in the record ostensibly on behalf of the defendant but to which defendant intended to object at the time of the trial?

In any event there was no showing of any factual evidence to support these most

speculative conclusions.

(c) One defendant in the State court criminal cases was a professional man, one a businessman and one a minor -- hence any publicity in connection with the matters then before the Court would be detrimental to their reputations and affect their livelihoods.

Pure speculation unsupported by proof. In view of the claim there had already been "substantial pretrial publicity" it is indeed difficult to understand in what manner additional publicity would substantially enhance this injury. Certainly the three-ring circus which the State court defendants have conducted gives little support to the notion they did not desire publicity and would be injured by it.

(d) In the event publicity is distributed generally with respect to the evidence submitted at the preliminary hearing the State court defendants might

well suffer irreparable injury; and there might well be a likelihood that a fair and impartial jury might not be obtainable at the trial.

Again sheer conclusive speculations, wholly lacking in any evidentiary factual basis.

While the Superior Court magistrate as to the Hooper and Scroggs case found that the chief prosecution witness against Hooper and Scroggs was a most unsavory and unprincipled person, a convicted prostitute and dope violator willing to make deals with police officers -- just how this bears upon the case is not plain -- the District judge apparently did not rely upon this as supporting the merits of plaintiffs', Hooper and Scroggs, claims of injury.

Superficially, at least, it would seem that these defendants stood to gain quite appreciably from exposure as to the

unreliability of their chief accuser.

We will now deal briefly with the authorities supporting each specification of error, grouped as seems convenient.

SPECIFICATIONS OF ERROR I, II, V AND VI

I

The District Judge erred in accepting jurisdiction and granting an injunction staying state court action contrary to the restrictions imposed upon such action by Section 2283, Title 28, United States Code for the reason such injunction was not

(a) expressly authorized by Act of Congress;

(b) necessary in aid of the District Court's jurisdiction; or

(c) necessary to protect or effectuate its judgments.

II

The District Judge erred in granting an injunction and staying State court action for the reason there was no showing of clear and imminent irreparable injury sufficient to warrant federal interference with State court action.

V

The District Judge erred in assuming

jurisdiction as to each complaint upon the authority of Section 1983, Title 42, United States Code, for the reasons

(a) said statute is inapplicable to the State of Arizona, a Superior Court or Justice of the Peace and a County Attorney;

(b) the ruling of a magistrate refusing to close a preliminary hearing to the public pursuant to such magistrate's interpretation of state statutes does not constitute action by a "person" under color of a statute, ordinance, regulation, custom or usage of a state;

(c) A Superior Court Judge, Justice of the Peace and County Attorney are not "liable" under Section 1983 to suit at the instance of a "party injured" when acting within their judicial or quasi-judicial authority and jurisdiction.

VI

The District Judge erred in assuming jurisdiction as to each complaint upon the authority of Section 1343, Title 28, United States Code, for the reason that the refusal of each magistrate to construe Rule 27, Arizona Rules of Criminal Procedure, as amended, and the Arizona constitutional provision, Article 2, Section 11, as allowing a magistrate inherent power to order a closed preliminary hearing does not constitute "deprivation, under color of any state law, statute,

ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States" nor does it amount to ground for equitable relief under any Act of Congress providing for protection of civil rights.

Section 2283, Title 28, United States Code, provides as follows:

"§ 2283. Stay of State court proceedings

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Section 1983, Title 42, United States Code, provides as follows:

"§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law,

suit in equity, or other proper proceeding for redress."

Section 1343, Title 28, United States Code, provides in part as follows:

"§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * * * * * * * * * * * * * * * * *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The first question for consideration is whether and under what circumstances a Federal court may issue injunctive process designed to stay State court action.

The original Judiciary Act of 1789 gave no express power to the federal courts to issue writs of injunction. In 1793 these courts

were given the specific power, but a power hedged with restrictions, one of which was

> " * * * nor shall a writ of injunction be granted to stay proceedings in any court of a state." Act of March 2, 1793, c. 22, § 5.

The restriction, thus enacted, was a significant illustration of the strong apprehension felt by early Congresses of the danger of encroachment by federal courts on state jurisdiction. 43 Harv. Law Rev. 345, 347.

Until about 1870 it appears doubtful if there was any exception to a literal reading of the statute. The statute seriously impaired the federal judicial power, but the courts bowed to the mandate of Congress. 30 Mich. Law Rev. 1145, 1148.

Thereafter, both by judicial construction and by statutory exception, the statute gradually evolved into what today is 28 U.S.C.A., § 2283.

As early as 1849, in the case of Peck v. Jenness, 7 How.612, Mr. Justice

Grier observed that when a State court once took jurisdiction of a case, its right to decide could not be taken away by proceedings in another court. This rule, he said, has its

> " * * * foundation not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable for a contempt in one, if they dare proceed in the other."

In 1858, in Taylor v. Carryl, 20 How. 583, Mr. Justice Campbell stated that it was the duty of the court

> " * * * to give preference to such principles and methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States, and submitting to the paramount authority of the same Constitution, laws, and Federal obligations * * * /Congress,/ in organizing the judicial power of the United States, exhibits much circumspection in avoiding occasions for placing the tribunals of the States and of the Union in any collision."

These were all civil cases. In 1898, in Harkrader v. Wadley, 172 U.S. 148, Mr. Justice Shiras said that the Constitution

> " * * * left to the States the right to make and enforce their own criminal laws, * * * [and it is the duty of the Supreme Court] to guard the States from any encroachment upon their reserved rights by the General Government or the courts thereof."

After 1890 federal district courts began to enjoin state and county prosecutors under alleged invalid laws. These decisions aroused intense hostility among the states and produced exactly the frictions between the nation and states which it had been the express object of the Act of 1793 to prevent. 43 Harv. Law Rev. 345, 374.

In Ex Parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1907), a federal court enjoined the Attorney General of Minnesota from enforcing a state law. When he ignored the injunction he was jailed for contempt. While upholding the contempt sentence, the U. S. Supreme Court used the following language:

> "The federal court cannot, of course, interfere in a case where the proceedings were already pending in a state court * * * the right to enjoin an individual, even though a state official,

> * * * does not include the power to restrain a court from acting in any case brought before it * * * If an injunction against an individual is disobeyed * * * such disobedience is personal only, and the court * * * can proceed without incurring any penalty * * * The difference between the power to enjoin an individual from doing certain things, and the power to enjoin courts from proceeding in their own way to exercise jurisdiction, is plain, and no power to do the latter exists because of a power to do the former."

Justice Harlan, dissenting, wrote:

> "This principle, if firmly established, would work a radical change in our governmental system. It would inaugurate a new era in the American judicial system and in the relations of the national and state governments. It would enable the subordinate Federal courts to supervise and control the official action of the states as if they were 'dependencies' or provinces. It would place the states of the Union in a condition of inferiority never dreamed of when the Constitution was adopted or when the Eleventh Amendment was made a part of the supreme law of the land."

In Toucey v. New York Life Insurance Co., 314 U.S. 118, 86 L.Ed. 100 (1941), a federal District Court enjoined a man from bringing a suit in a State court to adjudicate a matter

that was res judicata by virtue of a previous federal court decision. In vacating the injunction, Mr. Justice Frankfurter said:

> "/The act of 1793/ expresses on its face the duty of 'hands off' by the federal courts in the use of the injunction to stay litigation in a state court * * * The Act of 1793 expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly function of a state's judicial process."

The opinion closed by quoting from Justice Campbell's opinion in the case of Taylor v. Carryl, the words that we have quoted above.

In Douglas v. City of Jeanette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943) the court held that federal district courts have authority to decide cases under the Civil Rights Act, but said:

> "Want of equity jurisdiction, while not going to the power of the court to decide the cause * * * may nevertheless, in the discretion of the court, be objected to on its own motion * * * Especially should it do so where its powers are invoked to interfere by injunction with threatened

criminal prosecutions in a state court * * * Congress * * * has adopted the policy * * * of leaving generally to the state courts the trial of criminal cases arising under state laws, subject to review by this Court of any federal questions involved. Hence, courts of equity, in the exercise of their discretionary policies should conform to this policy by refusing to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury. * * * Courts do not ordinarily restrain criminal prosecutions. No person is immune from prosecution in good faith for his alleged criminal acts. Its imminence, even though alleged to be in violation of constitutional guarantees, is not a ground for equitable relief, since * * * constitutionality * * * may be determined as readily in the criminal case as in a suit for an injunction. * * * Where the threatened prosecution is by state officers for alleged violations of a state law, the state courts are the final arbiters of its meaning, subject only to review by this court on federal grounds. * * * Hence the arrest by the federal courts of the processes of the criminal law within the states, * * * are to be supported only on a showing of danger of irreparable injury 'both great and immediate' * * * It does not appear from the record that petitioners have been threatened with any injury other than that incidental to every proceeding brought lawfully and in good faith. * * *" (Emphasis added)

Stefanelli v. Minard, 342 U.S. 117, 72 S.Ct. 118, 96 L.Ed. 138 (1951), was a case in which the prosecuting attorney in a State court criminal case proposed to introduce evidence obtained by wiretapping, which action would have been a violation of a federal criminal law. The defendant asked the Federal court for an injunction. Mr. Justice Frankfurter's opinion said:

> "Even if the power to grant the relief here sought, may be fairly and constitutionally derived from the generality of the language of the Civil Rights Act, to sustain the claim would disregard the power of courts of equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the using of their power. Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States. We hold that the federal courts should refuse to intervene in State criminal proceedings to suppress the use of evidence even when claimed to have been secured by unlawful search and seizure. The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American

law. It is impressively reinforced when * * * relations * * * between co-ordinate political authorities are in issue. * * *

* * * * * * * * * * * * * * * * * * *

"At the worst, the evidence sought to be suppressed may provide the basis for conviction of the petitioners in the New Jersey Courts. Such a conviction, we have held, would not deprive them of due process of law.

"If these considerations limit federal courts in restraining state prosecutions merely threatened, how much more cogent are they to prevent federal interference with proceedings once begun. * * *

"If we were to sanction this intervention, we would expose every state criminal prosecution to insupportable disruption. Every question of procedureal due process of law - with its far-flung and undefined range - would invite a flanking movement against the system of state courts by resort to the federal forum, with review, if need be, to this court to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court - all would provide ready opportunities which conscientious counsel might be bound to employ to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution."

Any doubt as to the attitude of the United States Supreme Court in these cases was put to rest by the case of Wilson v. Schnettler, 365 U.S. 381, 5 L.Ed. 2d 620, 81 S.Ct. 682 in which the Court, in an opinion by Justice Whittaker, concurred in by six Justices, further quoted from Stefanelli v. Minard, supra. There the Supreme Court dealt with a case wherein defendants in an Illinois criminal case pending in an Illinois court charged with illegal possession of narcotics brought suit in the federal district court to impound the narcotics claimed to have been illegally seized and to enjoin the state narcotics agents from testifying at the trial of the criminal case in the State court. The narcotics agents moved to dismiss for failure to state a claim and the District Court granted the motion and dismissed the action. The Seventh Circuit affirmed and the Supreme Court granted certiorari to review the matter.

The defendants in the State criminal action had moved to suppress the evidence as illegally seized and the State court, after a hearing, had denied the motion to suppress. The Supreme Court of the United States, in affirming the dismissal of the action, reviewed the matter as follows:

> " * * * Indeed, the allegations of the complaint affirmatively show that petitioner does have such a remedy in the Illinois court and that he has actually prosecuted it there, but only to the point of an adverse interlocutory order. That court, whose jurisdiction first attached, retains jurisdiction over this matter to the exclusion of all other courts--certainly to the exclusion of the Federal District Court -- until its duty has been fully performed, Harkrader v Wadley, 172 US 148, 164, 43 L ed 399, 404, 19 S Ct 119; Peck v Jenness (US) 7 How 612, 624, 625, 12 L ed 841, 846, and it can determine this matter as well as, if not better than, the federal court. If, at the criminal trial, the Illinois court adheres to its interlocutory order on the suppression issue to petitioner's prejudice, he has an appeal to the Supreme Court of that State, and a right if need be to petition for 'review by this Court of any federal questions involved.' Douglas v Jeanette, 319 US 157, 163, 87 L ed 1324, 1329, 63 S Ct 877, 882. It is therefore clear that petitioner has a plain and adequate remedy at law in the

criminal case pending against him in the Illinois court.

"There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' Ponzi v. Fessenden, 258 US 254, 260, 66 L ed 607, 611, 42 S Ct 309, 22 ALR 879. Another is that federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . .' Douglas v. Jeannette, supra (319 US at 163).

"By this action, petitioner not only seeks to interfere with and embarrass the state court in his criminal case, but he also seeks completely to thwart its judgment by relitigating in a trial de novo in a federal court the very issue that he has already litigated in the state court. 'If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disruption. Every question of

> procedural due process of law--with its far-flung and undefined range--would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court [and, we may add, in the ruling of motions to suppress evidence, and in ruling the competency of witnesses and their testimony] -- all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution.' Stefanelli v. Minard, 342 US 117, 123, 124, 96 L ed 138, 143, 144, 72 S Ct 118."

If what is here attempted can be sustained, there is no reason why, with this action as a precedent, federal district court review of every ruling of the State court in the course of the trial may not be sought upon the claim that it contravenes some federal constitutional right of the defendant.

Finally, Cleary v. Bolger, 371 U.S. 392, 9 L.Ed. 390, 83 S.Ct. 385, considers and

lays aside the argument that federal courts should interfere to preserve federal constitutional rights on the theory that State court protection is inadequate.

A federal court had enjoined a state official from testifying in a state criminal prosecution and had been affirmed by a divided Court of Appeals.

In reversing Justice Harlan said:

> "Courts of equity traditionally have refused, except in rare instances, to enjoin criminal prosecutions. This principle 'is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue.' Stefanelli v Minard, 342 US 117, 120, 96 L ed 138, 142, 72 S Ct 118. It has been manifested in numerous decisions of this Court involving a State's enforcement of its criminal law. E.G., Pugach v Dollinger, 365 US 458, 5 L ed 2d 678, 81 S Ct 650; Douglas v Jeannette, 319 US 157, 87 L ed 1324, 63 S Ct 877, 882; Watson v Buck, 313 US 387, 85 L ed 1416, 61 S Ct 962, 136 ALR 1426; Beal v. Missouri P. R. Corp. 312 US 45, 85 L ed 577, 61 S Ct 418. The considerations that have prompted denial of federal injunctive relief affecting state prosecutions were epitomized in the Stefanelli Case, in which this Court refused to sanction an injunction

against state officials to prevent them from using in a state criminal trial evidence seized by state police in alleged violation of the Fourteenth Amendment:"

/The Court here quoted in part the language of Stefanelli, supra/ and then said:

"The withholding of injunctive relief against this state official does not deprive respondent of the opportunity for federal correction of any denial of federal constitutional rights in the state proceedings. To the extent that such rights have been violated, cf., e.g., Mapp v. Ohio, 376 US 643, 6 L ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933, supra, he may raise the objection in the state courts and then seek review in this Court of an adverse determination by the New York Court of Appeals. To permit such claims to be litigated collaterally, as is sought here, would in effect frustrate the deep-seated federal policy against piecemeal review."

See also:

Dumbrowski v. Pfister, 380 U.S. 479, 14 L.Ed.2d 22

Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424

Hague v. C.I.O., 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423

Ackerman v. International Longshoreman's Union, 187 F.2d 860 (C.A.9, 1951)

Cooper v. Hutchison, 184 F.2d 119 (C.A. 2, 1950)

Chestnut v. New York, 370 F.2d 1 (C.A. 2, 1966)

We turn now to the District Court's finding and conclusion that the Civil Rights statutes, Section 1343, Title 28 and Section 1983, Title 42, United States Code are or may be construed as an express "authorization by Act of Congress" for a federal court to enjoin State court action.

We first pause to point out that even if the bar of Section 2283, Title 28, United States Code, be lifted by the Civil Rights statutes, it by no means follows that a federal court will automatically enjoin State court action when the asserted federal constitutional rights of a defendant in a State court criminal prosecution are claimed to be infringed. The barrier of the long-standing policy of the federal courts against intermeddling in State court criminal matters must also be breached.

Certainly, while the United States Supreme Court has stepped aside from answering the question directly as to the effect of the Civil Rights Act as an express authorization by an Act of Congress, it has shown no disposition to reach that conclusion despite opportunity to so hold.

In Stefanelli, supra, the Court introduced its consideration of the propriety of an injunctive order involving state action by the phrase

> "Even if the power to grant the relief here sought may be fairly and constitutionally derived from the generality of the language of the Civil Rights Act to sustain the claim would disregard the power of Courts of Equity to exercise discretion when, in a matter of equity jurisdiction, the balance is against the using of their power."

Probably the most carefully reasoned case denying this effect to the Civil Rights Act is that of Baines v. City of Danville, 337 F.2d 579 (C.A. 4, 1964). The case was decided on rehearing by the Court sitting en banc. The Court expressly turned its attention

to the question as to the effect of the Civil Rights Act upon the equity power of a federal court as limited by Section 2283, Title 28, United States Code, for the District Judge did not reach the merits of the constitutional claims made and the alleged infringement thereof by state officials in the state courts of Virginia. He held Section 2283, supra, and the principles of comity required that he refrain from intermeddling in the Virginia court criminal prosecutions. While it is true there were two dissents the United States Supreme Court denied certiorari.

After considering the historical development of Section 2283 the Court said:

> "The anti-injunction statute, as revised in 1948, contains three general exceptions, but it is clear from the Reviser's notes that the only substantive change intended by the enlargement of the exceptions was the overturning of the result in Toucey v. New York Life Insurance Co., 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100. A

majority of the Supreme Court had held in Toucey that the anti-injunction statute prevented federal circumscription of relitigation in a state court of issues already fully litigated in the federal courts. The situation was analogous to a continuation of proceedings in a state court after the action had been effectively removed to a federal court. The purpose of the revision was to conform the two situations. There was also in mind the unseemliness and technical irrationality of concurrent proceedings in rem in state and federal courts, for the court which first seized the res acquired a possession which was necessarily exclusive of that of the other court. It was in recognition of these situations, and in order to overturn the result of Toucey that the 1948 revision introduced the exceptions 'where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.'

"The 1948 revision also qualified the literal prohibition of the anti-injunction statute with the words 'except as expressly authorized by Act of Congress.' This replaced the only exception earlier contained within that statute which had been limited to bankruptcy matters. The revisers stated that the change was designed to continue the bankruptcy exception and to recognize those other statutory exceptions which Congress had effectively accomplished without expressly amending the anti-injunction statute and those other exceptions which the Congress might authorize in similar fashion in the future.

"We thus come to the question whether the Civil Rights Act and the Judicial

Code, which confers upon the district courts jurisdiction to grant redress for deprivation by state action of Constitutional rights, constitute an express authorization by the Congress of federal stays of state court proceedings when a claimed denial of civil rights is the basis for invocation of the processes of the federal courts. This question, as such and in this context, the Supreme Court has never considered, though, as will presently appear, it has consistently applied the statute, or the underlying and closely related principles of comity, to foreclose interference by the lower federal courts with state court proceedings involving asserted deprivations of civil rights.

* * * * * * * * * * * * * * * * * *

"The anti-injunction statute can have effective application only with respect to those matters over which the district courts have a general equity jurisdiction. If there is no jurisdiction to grant an injunction of any kind, there is no room for the operation of a narrow statutory prohibition of injunctions having a specified effect. If every grant of general equity jurisdiction created an exception to the anti-injunction statute, the statute would be meaningless.

* * * * * * * * * * * * * * * * * *

"On the contrary, when the United States is not directly involved as a party and the danger of irritating conflict with state courts is great, the Supreme Court's

disposition has been toward a strict construction of § 2283. This is particularly illustrated by its decision in Toucey v. New York Life Insurance Co. It is apparent in its decision of Amalgamated Clothing Workers of America v. Richman Brothers Co., 348 U.S. 511, 514, 75 S.Ct. 452, 99 L.Ed. 600, in which it said '/b/y that enactment /the revision which is now § 2283/, Congress made clear beyond cavil that the prohibition is not to be whittled away by judicial improvisation.' In light of that admonition, this inferior court ought not lightly to undertake to relegate § 2283 to meaninglessness.

* * * * * * * * * * * * * * * * * * *

"Our construction is strongly supported by the Supreme Court's consistent support of the principle of § 2283 in civil rights cases. In every case before the Supreme Court in which federal interference with state court proceedings has been premised upon asserted denials of civil rights, the Supreme Court has required or sanctioned federal forbearance. It has usually done so on the basis of considerations of equity and comity fashioned by it, but which are identical with those which underlie the statute. If judicial principles of equity and comity prevent federal stay of criminal proceedings in a state court, it is difficult to see how an unqualified congressional command to the same end can be ignored. If a subsequent act of the Congress is an implied repeal of the absolute congressional direction, it cannot reasonably be said not to have modified a

> judicially fashioned rule which, at best, is coextensive with the earlier statute. * * * "
> 337 F.2d at 588, 589, 590, 591

The Court then relied upon Henderson v. Trailway Bus Company, 194 F.Supp. 423 (1961, D.C. E.D. Va.), a three-judge court. The three-judge court's decision was affirmed by the United States Supreme Court sub. nom. Robinson v. Hunter, 374 U.S. 488, 83 S.Ct. 1874, 10 L.Ed.2d 1044. The case involved prosecution of colored defendants for trespass through a "sit-in." The three-judge court held:

> "But if we have erred in not finding infirmity in these statutes or inequality in their enforcement, nevertheless the plaintiffs have not shown an entitlement to an injunction. In the first place, a plain and adequate remedy at law is available to them, and this readiness, of course, completely refutes their appeal to equity jurisdiction. Redress at law is provided in their opportunity to defend the criminal prosecutions, indeed to stand mute until a case is made against them beyond a reasonable doubt under these very statutes, with no burden whatsoever upon them as defendants there. Nothing

here indicates that a full and fair presentation, hearing and consideration of their views upon the validity of the two statutes cannot be had before the State courts in these prosecutions. Spence v. Cole, 4 Cir., 1943, 137 F. 2d 71, 72. There is also the ultimate right of review in the Federal Supreme Court, as illustrated by Murdock v. Commonwealth of Pennsylvania, 1943, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292. Irreparable injury to the plaintiffs through submission of their contentions in this manner to the State tribunals is not demonstrated. This circumstance obviously undermines all foundation for the injunction claimed.

"Strengthening this conclusion is the time-honored, judicious precept that a Federal court should never interpose its decree between a State and a criminally accused save in unusual circumstances--and none is here. Spence v. Cole, 4 Cir., 137 F.2d 71, 73, supra. So recently as February 27, 1961 the Supreme Court reaffirmed this rule. Aptly speaking to this point for the Court, in Wilson v. Schnettler, 365 U.S. 381, 81 S.Ct. 632, 635, 5 L.Ed. 2d 620, Justice Whittaker summarized the doctrine in this language:" /The Court here quoted the language referred to, supra, from Wilson v. Schnettler/.

In the interest of bringing this overlong brief to a close, we now merely cite the following cases as bearing upon or

rejecting the applicability of the Civil Rights Act as constituting such an express authorization by Act of Congress:

Outdoor American Corporation v. City of Philadelphia, 333 F.2d 963 (1964, C.A. 3)

Smith v. Village of Lansing, 241 F.2d 856 (C.A. 7)

Goss v. Illinois, 312 F.2d 257 (C.A. 7)

Sexton v. Barry, 233 F.2d 220 (C.A.6)

DeLoach v. Rogers, 268 F.2d 928 (C.A. 5)

Egan v. Aurora, 275 F.2d 377 (C.A. 7)

Reid v. City of Norfolk, 179 F.Supp. 768 (D.C. E.D. Va. 1959)

Fowler v. United States, State of California and its Officials, 258 F.Supp. 638 (D.C. C.D. 1966)

Hewitt v. City of Jacksonville, 188 F.2d 423 (C.A. 5, 1951)

Even in cases which have construed the Civil Rights Act as providing such express authorization the ruling has been that jurisdiction to supervise state action will only be exercised in exceptional cases meeting the clear and imminent danger of irreparable damage test.

Sarisohn v. Appellate Division 2nd Dept., Supreme Court of N.Y. 265 F.Supp. 455 (1967)

Wallach v. City of Pagedale, 376 F.2d 671 (C.A. 8, 1967)

United Steel Workers v. Bagwell, 239 F.Supp. 626 (D.C. W.D. No. Car. 1965)

Sires v. Cole, 320 F.2d 877 (C.A. 9, 1963)

Stift v. Lynch, 267 F.2d 237 (C.A. 7, 1959)

(Cf. Douglas v. City of Jeannette, supra)

SPECIFICATIONS OF ERROR III AND IV

III

The District Judge erred in granting an injunction staying State court action for the reason the plaintiffs (defendants in the State court) had an adequate remedy for relief, if justified, and had not exhausted their state remedies, i.e., by Motions to Quash the Information addressed to the trial court and by appeal to the state appellate courts if necessary. Further, a Writ of Mandamus does not lie to control discretion of an inferior tribunal or to review error in interlocutory orders within the jurisdiction of the inferior tribunal.

IV

The District Judge erred in granting an injunction staying State court action for the reason that the complaints affirmatively

showed on their face that substantially the same relief had been sought by plaintiffs in both the Arizona Court of Appeals and the Arizona Supreme Court and had been refused plaintiffs by the Arizona appellate courts. This constituted a State court interpretation of Arizona law that either the magistrate had no inherent power to close a hearing because of Article 2, Section 11 of the Arizona Constitution or that there was no sufficient showing of clear, imminent and irreparable injury to plaintiffs such as warranted denying the public the right and liberty of observing the court processes of the Arizona Courts as guaranteed by both the United States and the Arizona Constitutions. In either event, the error of the Arizona Courts, if in fact error was committed, is not subject to review by a United States District Court under its equity powers.

Article 2, Section 11, Arizona State Constitution provides:

> "§ 11. Administration of justice
>
> Section 11. Justice in all cases shall be administered openly, and without unnecessary delay."

This provision clearly states the public policy of Arizona that the business of its Courts shall be transacted in full public view. It is an addition to and supplements Article 2, Sections 23 and 24 of the Arizona Constitution which guarantee

a trial by jury, and in criminal cases a public jury trial.

It seems clear, therefore, that when the Arizona Supreme Court rejected the Petition for a Writ of Mandamus it well may have done so by reason of the above constitutional provision.

However, appellees defeat their own case when, after establishing that the magistrate's power must be inherent and hence discretionary, they then assert that they have exhausted their state court remedies through Petitions for a Writ of Mandamus.

A Writ of Mandamus is not allowable under Arizona law to control or supervise the exercise by an inferior tribunal of a discretionary power. In Greater Arizona Savings and Loan Assoc. v. Tang, 97 Ariz. 325, 400 P.2d 121, the Arizona Supreme Court said:

> "Mandamus will issue to compel public officers, including judges of inferior courts, to perform an act which the law specifically enjoins as a duty * * * However, if the act sought for be judicial

> in its character, this court cannot command what its action should be, much less can command how and what said action should be after the matter has been acted upon, no matter how erroneous. * * * It is fundamental that where, as here, the lower court has jurisdiction of the matter it has the power to determine and decide the matter, which includes the power to decide it wrong as well as decide it right."

See also In Re American Employers Ins. Co., 91 F.2d 731 (5th Cir. 1937)

Mandamus, of course, is the same as an injunction. There is no difference between enjoining a judge from holding closed hearings by Writ of Mandamus and directing that the judge hold open hearings.

If, after the prelimary hearing is closed, true prejudice has in fact been established, the defendant in a criminal case may move to quash the Information. While Rule 169, Arizona Rules of Criminal Procedure, does not explicitly make reference to such reason for a Motion to Quash, plainly if an illegal preliminary hearing has been

held there has been no lawful preliminary hearing and hence the defendant may move to quash.

Nor is the defendant without a remedy if denied a closed hearing. In People v. Elliott, 354 P.2d 225 the California Supreme Court held that improper refusal of a closed preliminary hearing survived as grounds for reversal of a criminal conviction. While there a statute authorizing such a demand by a defendant was involved the improper denial of such a request, if the Court had the power to grant it, would seem equally open to appellate scrutiny.

Finally, all claims of prejudice are foreclosed appellees by the case of United States v. Handy, 351 U.S. 454, 76 S.Ct. 965, 100 L.Ed. 1331. The Court said:

> " * * * While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside,

and that it be sustained not as a matter of speculation but as a demonstrable reality.' Adams v. United States, 317 US 269, 281, 87 L ed 268, 276, 63 S Ct 236, 143 ALR 435. See also, Buchalter v. New York, 319 US 427, 431, 87 L ed 1492, 1496, 63 S Ct 1129; Stroble v. California, 343 US 181, 198, 96 L ed 872, 885, 72 S Ct 599. Justice Holmes, speaking for a unanimous Court in Holt v. United States, 218 US 245, 251, 54 L ed 1021, 1029, 31 S Ct 2, 20 Ann Cas 1138, cautioned that 'If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day.'

"We have examined petitioner's allegations, the testimony and documentary evidence in support thereof, and his arguments. We conclude that the most that has been shown is that, in certain respects, opportunity for prejudice existed. From this we are asked to infer that petitioner was prejudiced. The law recognizes that prejudice may infect any trial and provides protection against. For example, provision is made for the voir dire examination and for challenges of jurors who indicate that they may be prejudiced. In addition, a substantial number of peremptory challenges is allowed. This gives to each party a large discretion to exclude jurors deemed objectionable for any reason or no reason. Another protection is available through the severance of the trials of the defendants and through continuances of the respective trials.

> Still another means of protection is that of a change of venue for proper cause.
>
> "In the instant case, notwithstanding the fact that competent counsel for petitioner did not use all of his peremptory challenges after a searching examination of prospective jurors on voir dire, and did not seek a continuance of the trial or a change of venue, petitioner asks this Court, in effect, to infer that the news coverage of the robbery and proceedings prior to petitioner's trial, including the Foster-Zeitz trial, created such an atmosphere of prejudice and hysteria that it was impossible to draw a fair and impartial jury from the community or to hold a fair trial. * * * "
> 100 L.Ed. at 1338

No reasons, other than by way of speculative conclusions, have been shown to warrant federal intervention and intermeddling in orderly State court criminal processes.

SPECIFICATION OF ERROR VII

The District Judge erred in finding (p. 1, lines 21-29, Findings of Fact, Conclusions of Law and Order) that "both counsel (counsel for Ron Kent Hooper and Purvis Ole Scroggs and for State of Arizona and Robert Corbin, as County Attorney) concurred that

if * * Honorable William H. Gooding * * had inherent power to exclude the public * * the cause referred to was an appropriate cause for the Court to exercise its discretion in favor of a closed hearing" for the reason that there is no evidence in the record to support such a finding.

A reading of the transcript discloses that the Court's choice of words goes beyond what the County Attorney said. His remarks were directed to the factual assertions made by defense counsel.

This specification is made simply to avoid apparent agreement with the plaintiffs' position.

CONCLUSION

The interlocutory order in Hooper and Scroggs should be vacated with directions to dismiss the complaint.

The temporary order in Borquez should be vacated and a Writ of Prohibition issued directing the District Judge to desist from further entertaining the complaint

for injunctive relief.

Respectfully submitted,

DARRELL F. SMITH
The Attorney General of the
State of Arizona

NORVAL C. JESPERSON
Assistant Attorney General

Norval C. Jesperson

159 Capitol Building
Phoenix, Arizona 85007

MARK WILMER
Special Assistant Attorney
General

Mark Wilmer

400 Security Building
Phoenix, Arizona 85004

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Attorney